Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

LANCE ALLEN ROOT,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioner denied the right to Due Process and Fundamental Fairness as guaranteed by the Fourteenth Amendment to the United States Constitution where the trial court allowed the State to present evidence of Petitioner's prior DUI convictions to fulfill an element of a charge of aggravated DUI (third offense DUI within 60 months) when Petitioner agreed to stipulate to the existence of the prior convictions in order to preclude evidence of the prior convictions from being presented to the jury?

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OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 985 P.2d 263 and reproduced at Appendix 1a-10a. A motion for reconsideration was filed in the Arizona Supreme Court and denied by order of the court on September 21, 1999. The order is reproduced at Appendix 34a-35a. The Arizona Court of Appeals opinion is reported at 973 P.2d 1203 and reproduced at Appendix 11a-25a. The opinion of the trial court is unreported.

STATEMENT OF JURISDICTION

The Arizona Supreme Court issued its judgment on July 8, 1999, and denied the motion for rehearing on September 21, 1999. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

PROVISIONS INVOLVED

The relevant provisions of the Fourteenth Amendment to the United States Constitution are reproduced at Appendix 36a. Rule 403 and Rule 404(b) of the Federal Rules of Evidence and the Arizona Rules of Evidence are identical and reproduced at Appendix 37a. Rule 19.1.b, Arizona Rules of Criminal Procedure, is reproduced at Appendix 38a. The relevant provisions of Arizona Revised Statutes §28-697(A)(2) are reproduced at Appendix 39a.

STATEMENT OF THE CASE

On August 22, 1996, Petitioner Lance Allen Root was charged in the Superior Court of Maricopa County, Arizona, with aggravated driving while under the influence of alcohol ("aggravated DUI"), a felony, in violation of Arizona Revised Statutes §13-697(A)(2).[1] (App., *infra*, 39a). The statute sets forth that a person is guilty of aggravated DUI if that person was driving while under the influence of alcohol and, at the time of the offense, had two prior convictions for DUI within 60 months.

Prior to trial, Petitioner filed a motion offering to stipulate to his two prior DUI convictions if, in exchange for his stipulation, the trial court precluded the State from presenting evidence of the convictions to the jury. The Petitioner argued that allowing the jury to hear about his two prior DUI convictions would be unfairly prejudicial when the Petitioner was willing to stipulate to that element of the charge. The

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[1]In 1997, the statute was renumbered as A.R.S. §13-1383(A)(2).

trial court refused Petitioner's stipulation stating:

> . . . I appreciate from whence you have come, because at one time our [Arizona] Supreme Court told us that, yes, we need a bifurcated trial to determine whether or not a defendant has two prior felony convictions, and then they changed their mind. And there's nothing to say that they won't change their mind again. It has to do with, in essence, prior bad acts and how prejudicial they are.
>
> Obviously, if in *Old Chief* the prior crime has been possessing a lobster that was less than six inches, the defendant would have wanted that made known to the jury, and I agree with you, and that's why we have the Rule that precludes similar bad acts from being introduced unless there's more probative value than prejudicial value, but the law as it currently stands in Arizona is that they are elements of the offense and must be proven by the State and the trial need not be bifurcated. I will go with the law as it currently exists and allow you to be the one that goes and gets it changed.

(Reporter's Transcript of Proceedings, reproduced at Appendix 26a-33a). During the trial, the State presented evidence of Petitioner's two prior DUI convictions to the jury. The jury found the Petitioner guilty of aggravated DUI.

The trial court entered judgment against Petitioner on August 4,

1997, and Petitioner appealed to the Arizona Court of Appeals, challenging the admission of the prior DUI convictions as unfairly prejudicial and unconstitutional.

On December 8, 1998, the court of appeals reversed the conviction and remanded the case to the trial court for a new trial. (court opinion, App., *infra*, 11a-25a) The court of appeals held that the admission of the prior convictions was an abuse of discretion and concluded that the danger of unfair prejudice in introducing the prior convictions outweighed any probative value since the Petitioner had stipulated to that element of the offense.

The State appealed the court of appeals decision to the Arizona Supreme Court and the Arizona Supreme Court granted review. The case was consolidated for review with *State ex rel. Romley v. Galati*, 973 P.2d 1198 (Ariz. App. 1998), a case involving the same issue. The Arizona Supreme Court reversed the court of appeals decision in Petitioner's case and held that the trial court could not preclude the jury from hearing evidence of prior convictions that are elements of

the charged offense. (court opinion, App., *infra*, 1a-10a). The Arizona Supreme Court based its decision on Rule 19.1.b., Arizona Rules of Criminal Procedure, which provides for a bifurcated trial on the issue of prior convictions unless the conviction constitutes an element of the offense. (Rule 19.1.b., App., *infra*, 38a). The Arizona Supreme Court distinguished *Old Chief* by stating:

> The first point of distinction between these cases and *Old Chief* is that the defendant in *Old Chief* agreed the jury would hear his stipulation, whereas [Petitioners] wanted their stipulations kept from the jury. The second point of distinction is that in *Old Chief*, the element at issue was the existence of any prior conviction; the government did not have to show the nature of the felony to establish the charged offense.

(court opinion, App., *infra*, at 7a). The Arizona Supreme Court did not address the Constitutional issues of Due Process and Fundamental Fairness or the prejudice to the Petitioner under evidentiary rules. However, in a specially concurring opinion, Justice Feldman disagreed with the majority's analysis and cited Rules 403 and 404, Arizona Rules of Evidence, as his basis for disagreement. Justice Feldman stated:

> In my view, [Rules 403 and 404] are not trumped by Rule 19.1, Ariz. R. Crim. P., which was promulgated just to avoid prejudice in situations similar to that in the present case. . . [Rule 19.1] does not deal with the present situation but, rather, with trial of contested issues regarding prior convictions. I therefore believe Rule 19.1 co-exists with Rule 403 and, as recognized in *Root*, the trial judge may accept the stipulation and withhold evidence of the prior convictions from the jury.
>
> . . .
>
> By enacting the current statute, the legislature changed prior convictions in DUI cases from sentence enhancers to elements of the crime. This, of course, does not overcome the provisions of Rule 403 permitting judges to exclude relevant evidence when probative value is outweighed by prejudice.

(court opinion, App., *infra*, at 9a).

A motion for rehearing was sought but denied by the Arizona Supreme Court on September 21, 1999. (App., *infra*, at 34a-35a).

REASON FOR GRANTING THE PETITION

The Arizona Supreme Court's decision in this case violates Constitutional principles of Due Process and Fundamental Fairness and is in direct conflict with the decisions reached in the highest courts of Wisconsin, Minnesota, North Dakota, New Hampshire, WestVirginia, as well as this Court's decision in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

In cases that have dealt directly with the issue of introducing prior DUI convictions in a DUI-related case, Arizona takes the minority view that a court cannot preclude the introduction of prior DUI convictions that are elements of the offense when a defendant stipulates to the existence of the prior convictions. Consequently, Petitioner was denied a fair trial.

I. ALLOWING THE INTRODUCTION OF PRIOR DUI CONVICTIONS IN A DUI CASE WHERE PETITIONER OFFERED TO STIPULATE TO THE PRIOR CONVICTIONS DENIED PETITIONER FUNDAMENTAL FAIRNESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The right of an accused in a criminal trial to Due Process is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). In order to fairly defend against the State's accusations, the accused has the right to have his trial free from unfairly prejudicial evidence, including evidence of prior convictions.

This Court recently addressed the prejudicial nature of prior conviction evidence in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.E.2d 574 (1997). In *Old Chief*, the Petitioner was charged with being a felon in possession of a firearm. The Petitioner offered to stipulate to the element of having a prior felony in order to preclude the jury from hearing about the nature of his prior conviction. The government sought to introduce evidence of the nature of the prior conviction and the government prevailed.

The United States Supreme Court reversed and held that evidence of the nature of the prior conviction was unfairly prejudicial and

should not have been admitted. In discussing the "unfair prejudice" associated with this type of evidence, the Court stated:

> The state may not show defendant's prior trouble with the law, specific criminal acts,. . .even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and *deny him a fair opportunity to defend against a particular charge*. . . Disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Old Chief, 519 U.S. at 181, 117 S.Ct. at 650-51 (Emphasis added)(citing *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948)) (footnotes omitted). The Court further stated:

> There can be no question that the evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. *That risk will vary from case to case*, for the reasons already given, it will be substantial whenever the official record offered by the government would be arresting enough to lure a jury into a sequence of bad character reasoning. *Where a prior conviction was for . . . one similar to other charges in a pending case, the risk of unfair prejudice would be especially obvious . . . .*

Old Chief, 519 U.S. at 185, 117 S.Ct. at 652 (Emphasis added).

The Court denounced the government's argument in *Old Chief* that it needed to introduce the element of the prior conviction to tell a "continuous story." The Court concluded that precluding evidence of the nature of the prior conviction was justified because that evidence was "entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." *Old Chief,* 519 U.S. at 191, 117 S.Ct. at 655. The Court weighed the prejudicial nature of the evidence against its probative value and held:

> In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of *unfair prejudice did substantially outweigh the discounted probative value* of the record of conviction, and it was *an abuse of discretion to admit the record when an admission was available.*

Old Chief, 519 U.S. at 191, 117 S.Ct. at 656 (Emphasis added).

Federal evidentiary rules have also addressed the admissibility limitations of "other crimes" evidence. Rule 404(b), Federal Rules of

Evidence, sets forth that evidence of other crimes "is not admissible to prove the character of a person in order to show action in conformity therewith." (App., *infra*, 37a). Rule 403, Federal Rules of Evidence, permits a judge to exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice. (App., *infra*, 37a).

In discussing Rule 403 and Rule 404(b), this Court in *Old Chief* concluded that propensity evidence would be an "improper basis" for a conviction and that conviction is subject to an analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence. *Old Chief*, 519 U.S. at 182, 117 S.Ct. at 651. Rule 403 and Rule 404(b) of the Arizona Rules of Evidence mimics the Federal Rules of Evidence and, thus, the analysis under *Old Chief* applies to the case at bar.

In the case at bar, the risk of unfair prejudice was that a jury could find the Petitioner guilty based upon the fact that he had two prior convictions for the same offense. By agreeing to stipulate to the prior

convictions, the State did not have to prove that element of the charge to the jury. Consequently, any probative value of admitting that evidence was virtually non-existent since evidence of the prior convictions was not necessary to prove that Petitioner was driving under the influence on the date charged. The only possible value it had to the State was to prejudice the jury against Petitioner.

The Arizona Supreme Court failed to address the issues of Due Process and Fundamental Fairness or weigh the prejudicial and probative value of the evidence. The court's ruling was predicated on the fact that prior convictions constitute an element of the offense of aggravated DUI in Arizona. The Arizona Supreme Court held that, as an element, the evidence of the prior convictions was admissible under Rule 19.1.b, Arizona Rules of Criminal Procedure. (Rule 19.1.b, App., *infra*, 38a).

Arizona's procedural Rule 19.1.b cannot trump the Constitutional right to Due Process and Fundamental Fairness as guaranteed by the Fourteenth Amendment. *See Chambers*,410 U.S. at 298, 93 S.Ct. at

1047 (Mississippi's 'voucher' rule, precluding cross-examination and impeachment of a party's own witness, interfered with defendant's Constitutional right to defend against the State's charges). The Arizona Supreme Court was required to address the issues of Due Process and Fundamental Fairness in determining the admissibility of the evidence. By failing to address the Constitutional aspects and unreasonableness of Rule 19.1.b, the Arizona courts denied Petitioner a fair trial.

II. ARIZONA IS IN DIRECT CONFLICT WITH THE MAJORITY OF STATES IN ITS TREATMENT OF A DEFENDANT'S EFFORTS TO PRECLUDE PREJUDICIAL EVIDENCE OF PRIOR DUI CONVICTIONS IN A DUI CASE.

The Arizona Supreme Court has taken the position that evidence of a defendant's prior DUI convictions is admissible because it fulfills an element of the offense of aggravated DUI. Arizona's position conflicts with the majority of states which have addressed this exact issue. Only Oklahoma's highest court has agreed with Arizona's position. However, both Oklahoma and Arizona have failed to address

the Constitutional issues associated with allowing evidence of similar prior convictions into evidence.

The majority view recognizes the Constitutional principles of Due Process and Fundamental Fairness and those courts have held that the danger of unfair prejudice precludes the admission of evidence of similar prior convictions where an accused offers to stipulate to those convictions.

In *State v. Alexander*, 571 N.W.2d 662 (Wisc. 1997), the defendant was charged with operating a motor vehicle with a blood alcohol concentration of .08 or more with two prior DUI convictions. Prior to trial, the defendant offered to stipulate to his prior convictions and moved the court to preclude the state from offering evidence of those convictions. The trial court refused to require the state to stipulate to the convictions and allowed the evidence to be presented to the jury.

The Wisconsin Supreme Court held that all evidence of the prior convictions should have been kept from the jury. *Id.*at 672. The court

cited *Old Chief* and its version of evidence Rule 403, modeled after Rule 403 of the Federal Rules of Evidence, and determined that because the prior offense was of the same nature as the charged crime the risk of unfair prejudice was particularly great. *Id.* at 668.

The *Alexander* court agreed with *Old Chief* in its determination that the prior convictions constituted a "status" element which did not add any evidentiary depth to the state's story. *Id.* at 671. The Wisconsin court acknowledged that the evidence did, however, tell the jury that the defendant has had a problem in the past of drinking and driving. *Id.* The court found that the danger of unfair prejudice far outweighed any probative value of the evidence and concluded that the trial court abused its discretion in admitting proof of the prior convictions. *Id.* at 672.

In *State v. Berkelman*, 355 N.W.2d 394 (Minn. 1984), the defendant was charged with driving with a blood alcohol concentration of .10 or more within 5 years of a prior conviction for DUI. The defendant attempted to stipulate to the prior conviction and

preclude evidence of it at trial. The trial court denied his request.

The Minnesota Supreme Court held that the trial court erred in admitting evidence of the prior conviction when the defendant agreed to stipulate to that element of the offense. *Id.* at 397. The *Berkelman* court concluded that the danger of unfair prejudice outweighed the probative value of the evidence where the defendant admitted the existence of an element of the offense. *Id.* The court reasoned that the defendant's fear that the jury might impermissibly use his prior DUI conviction to convict him of the current DUI charge was justified and should have been kept from the jury. *Id.*

In *State v. Saul*, 434 N.W.2d 572 (N.D. 1989), the defendant was charged with DUI with three prior DUI convictions. Prior to trial, the defendant stipulated that he had three prior convictions and sought to suppress evidence of those convictions. The trial court denied the stipulation and defendant was convicted.

On appeal, the Supreme Court of North Dakota reversed the conviction and held that if the defendant stipulated to his prior

convictions, the submission of evidence on those convictions to a jury constituted prejudicial and reversible error. *Id.* at 575. Citing Weinstein's *Evidence*, the *Saul* court recognized that an accused with a record risks that the jury will assume that he committed the charged offense if his prior convictions were for a similar offense. *Id.* at 574. The court determined that by stipulating to the prior convictions, the defendant effectively removed the element from the charge thereby making its admission unnecessary and prejudicial *Id.* at 575 (citing Rule 403 and Rule 404(b), N.D.R.Ev.).

In *State v. Cardin*, 523 A.2d 105 (N.H. 1987), the defendant was charged with DUI as a second offense. At trial, the defendant filed a motion *in limine* offering to stipulate to the prior conviction and requested that the court order the State to make no mention of it at trial. The court denied the motion and the evidence was admitted, resulting in a conviction.

The Supreme Court of New Hampshire reversed and held that defendant's offer to stipulate to the prior conviction precluded the

prosecutor from introducing the prior conviction at trial. *Id.* at 106. The court did not discuss the issues of prejudice and found that the prior conviction was not an element of the offense but a predicate condition for enhancement of sentence. *Id.* Thus, since the prior conviction was only relevant to sentencing, the jury need not know of it. *Id.*

In *State v. Nichols*, ___ S.E.2d ___ (W.Va. 1999)(1999 WL 1101343), the defendant was charged with third offense DUI and offered to stipulate to his two prior convictions at trial in order to remove that element from evidence. The trial court denied the stipulation and evidence of the prior convictions was introduced, resulting in a conviction.

The Supreme Court of Appeals of West Virginia reversed the conviction on the basis that the trial court erred in admitting evidence of defendant's prior DUI offenses. The court overruled prior West Virginia precedent on the same issue because prior decisions had failed to discuss the prejudicial impact of the evidence and, instead,

focused only on the fact that the prior convictions were "elements" of the charged offense. *Id.* (page references unavailable).

Citing *Old Chief*, the *Nichols* court agreed that the prior DUI convictions were "status" elements that were independent of the charged offense's mental and physical requirements, thereby making it unnecessary to present the prior convictions to the jury. *Id.* The *Nichols* court determined that the risk of unfair prejudice substantially outweighed the probative value of the record of the conviction, and held that a trial court must preclude the introduction of prior convictions that constitute status elements when a defendant offers to stipulate to those convictions. *Id.*

The minority position of Arizona is also held by Oklahoma. In *Baker v. Oklahoma*, 966 P.2d 797 (Okla. 1998), the defendant was charged with second degree felony-murder arising from a vehicular homicide perpetrated by a person committing a felony. In *Baker*, the underlying felony alleged was second-offense DUI. The defendant stipulated to his prior conviction for DUI; however, the jury was made

aware of it. The defendant was convicted and appealed the admission of the prior conviction.

The Court of Criminal Appeals of Oklahoma affirmed the conviction and distinguished *Old Chief*. The court reasoned that in *Old Chief*, the nature of the prior felony was not a necessary element for the charge, whereas a felony DUI required proof of a prior conviction for DUI as a specific element that must be proven beyond a reasonable doubt. *Id.* at 798. In its analysis, the *Baker* court failed to address any issues of prejudice to the accused and concluded that the state had a right to present material evidence of an element and that right could not be taken away by an admission or stipulation. *Id.*

CONCLUSION

The Arizona Supreme Court's decision allowing evidence of Petitioner's prior DUI convictions to be heard by the jury in his aggravated DUI case violated Petitioner's right to Due Process and Fundmental Fairness under the Fourteenth Amendment to the United States Constitution. Arizona's treatment of this issue conflicts with

decisions of this Court in *Old Chief v. United States*, and the highest courts in Wisconsin, Minnesota, North Dakota, New Hampshire, and WestVirginia. This case presents a rare opportunity for the United States Supreme Court to address this disputed issue and bring much-needed clarity to this area of criminal law. Therefore, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, ex. Rel. RICHARD M. ROMLEY, Maricopa County Attorney, Petitioner,	)	Supreme Court No. CV-98-0558-PR
v.	)	Court of Appeals No. 1CA-SA 98-0143
HON. FRANK T. GALATI, JUDGE OF SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge,	)	Maricopa County No. CR 97-08186
RUSSELL K. PETERSEN, Real Party in Interest.	)	CONSOLIDATED
STATE OF ARIZONA, Appellee,	)	Supreme Court No. CR-99-0014-PR
v.	)	Court of Appeals No.1 CA-CR 97-0737
LANCE ALLEN ROOT, Appellant.	)	Maricopa County No. CR 96-92542
	)	**OPINION**

Special Action from the Superior Court of Maricopa County
Cause No. CR 97-08186
The Honorable Frank T. Galati, Judge
REVERSED

Opinion of the Court of Appeals, Division One
193 Ariz. 437, 973 P.2d 1198 (1998)
APPROVED

Appeal from the Superior Court of Maricopa County
Cause No. CR 96-92542
The Honorable Cheryl K. Hendrix, Judge
AFFIRMED

Opinion of the Court of Appeals, Division One
193 Ariz. 442, 973 P.2d 1203 (1998)
VACATED

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McGregor, Justice

¶ 1 These consolidated cases present the question whether a trial judge can order a bifurcated trial that permits a defendant to plead guilty or to stipulate to prior convictions that are elements of a charged offense, withhold knowledge of the defendant's plea or stipulation from the jury, and submit the remaining elements to the jury. We granted review of two conflicting court of appeals' opinions, *State v. Galati*, 193 Ariz. 437, 973 P.2d 1198 (App.1998) (hereinafter *Petersen*), and *State v. Root*, 193 Ariz. 442, 973 P.2d 1203 (App.1998), to address this issue of statewide importance and

resolve the conflict. *See* Ariz. Const. art. VI, § 5(3); A.R.S. § 12-120.24; *Espinoza v. Martin*, 182 Ariz. 145, 146, 894 P.2d 688, 689 (1995) (grant of special action relief proper when issue is of statewide importance). We hold that a trial judge cannot bifurcate a trial when doing so precludes a jury from considering prior convictions that are elements of a charged offense.

I.

A.

¶ 2 The State charged defendant Russell K. Petersen with two counts of aggravated driving under the influence (DUI), in violation of Arizona Revised Statutes (A.R.S.) sections 28-1383.A.1 and .2.[1] These subsections provide that a person who commits a DUI while his or her driver's license is "suspended, canceled, revoked or refused or while a restriction is in place on the ... license," or who "within a period of sixty months commits a third or subsequent" DUI, is guilty of aggravated DUI, a felony. A.R.S. §§ 28- 1383.A.1, .2.

¶ 3 The aggravating element of count one against Petersen was that he committed a DUI while his driver's license was suspended, canceled, revoked or refused, or restricted due to a previous DUI. The aggravating element of count two was that Petersen had been twice convicted of DUI within the previous sixty months.

¶ 4 Before trial, Petersen offered to stipulate to the aggravating elements on the condition that the jury would not hear about them. Petersen agreed that, if the jury convicted him of a misdemeanor DUI,

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[1] The statute was renumbered after the State brought charges against Petersen. In this opinion, we use the current number, A.R.S. §28-1383, rather than the superseded number, A.R.S. §28-697.

the trial court then could enter judgment against him on the two counts of aggravated DUI. The State objected to that procedure, arguing that the trial court could not preclude the jury from hearing evidence related to the aggravating elements.

¶ 5 The trial court concluded that permitting the jury to hear evidence about the aggravating elements would result in unfair prejudice, and that the State need not present evidence of those elements if Petersen admitted to them. The trial court then ordered that it would bifurcate the trial and conduct a modified guilty plea proceeding in which Petersen could knowingly, intelligently, and voluntarily admit the aggravating elements. If the trial court accepted his plea, trial to the jury would proceed only on the current DUI charge, and the jury would never hear evidence of the aggravating elements. From this ruling, the State filed a petition for special action to the court of appeals.

¶ 6 The court of appeals accepted jurisdiction, reversed the ruling of the trial court, and vacated the bifurcation order. Relying upon Rule 19.1.b of the Arizona Rules of Criminal Procedure (Rule 19.1.b) and this court's opinion in *State v. Geschwind*, 136 Ariz. 360, 666 P.2d 460 (1983), and distinguishing *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the court of appeals held that the trial court could not prevent the jury from knowing about the aggravating elements.

B.

¶ 7 In Root, the State charged defendant Lance Allen Root with two counts of aggravated DUI, invoking the same subsections of A.R.S. section 28-1383 applicable in Petersen.

¶ 8 Before trial, Root offered to stipulate to his two prior DUI convictions, and filed a motion in limine seeking to preclude the State

from presenting evidence of those prior convictions to the jury. The trial court denied Root's motion on the ground that the two prior DUI convictions constituted elements of the charged offense of aggravated DUI. The jury convicted Root of aggravated DUI. Root appealed his conviction and sentence to the court of appeals.

¶ 9 A second division of the court of appeals, relying upon the United States Supreme Court's decision in *Old Chief*, reasoned that Root's stipulation satisfied the aggravating elements of the offense charged and avoided the risk that the jury would convict Root solely because he had committed the same offense on two previous occasions. The court reversed Root's conviction and remanded the matter for a new trial.

II.

¶ 10 Neither Petersen nor Root disputes that prior convictions for DUI or driving on a suspended license while committing a DUI are elements of aggravated DUI. They argue, however, that a court can bifurcate those elements from trial of a current DUI charge and permit the jury to consider only the evidence offered to establish the current charge. This court's own rules prohibit using that procedure.

¶ 11 Rule 19.1.b defines the procedure a court should follow when a defendant is charged with prior convictions. The rule states that a defendant is entitled to a bifurcated trial "[i]n all prosecutions in which a prior conviction is alleged, *unless such conviction is an element of the crime charged*." (Emphasis added.) The procedure described in the rule, which is essentially the procedure these defendants request, expressly applies *when a prior conviction is not an element of the crime charged*. Because the facts to which these defendants offered to stipulate constituted elements of aggravated DUI, they were not entitled to a bifurcated trial under the clear language of Rule 19.1.b.

¶ 12 The distinction made in Rule 19.1.b reflects the central role of the jury, which is charged with responsibility for determining whether the State has proved each element of the charged offense beyond a reasonable doubt. That obligation cannot be delegated, in part, to the trial judge. See *State v. Powers*, 154 Ariz. 291, 293, 742 P.2d 792, 794 (1987) (a jury must determine the existence of all elements of a crime beyond a reasonable doubt).

¶ 13 Our decision in *Geschwind*, which resolved an issue similar to that raised here, also recognized the importance of submitting all elements of a crime to the jury for decision. In *Geschwind*, we held that when a prior conviction is an element of the present charge, the trial court cannot preclude the jury from hearing evidence of that conviction. 136 Ariz. at 362, 666 P.2d at 462. We reasoned that the nature "of the prior [DWI] conviction as an element of the crime rather than a mere sentencing consideration settles the question of appellant's entitlement to a bifurcated trial [in the negative] ... because proof of the prior conviction was part of the state's burden of proving all the elements of the crime charged." *Id.*; *see also State v. Flood*, 149 Ariz. 199, 717 P.2d 878 (1986) (holding that a prior DWI conviction, the existence of which merely increased the punishment for subsequent DWI convictions under previous Arizona law, did not constitute an element of the offense, and thus the trial court could bifurcate the defendant's DWI trial).

¶ 14 We distinguish *Old Chief*, on which defendants rely, on two fronts. In *Old Chief*, the government charged the defendant with being a felon in possession of a firearm. The defendant, who did not want the jury to learn that his prior felony conviction involved violent behavior, offered to submit to the jury a stipulation that he had been previously convicted of a felony. The jury therefore would know he was a felon, but not the nature of the prior offense. *Id.* at 175, 117 S.Ct. at 648. The Supreme Court held that submitting the stipulation was proper because evidence of the nature of the defendant's felony

conviction could cause unfair prejudice, given its capacity to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Id.* at 180, 117 S.Ct. at 650.

¶ 15 The first point of distinction between these cases and *Old Chief* is that the defendant in *Old Chief* agreed the jury would hear his stipulation, whereas Petersen and Root wanted their stipulations kept from the jury. The second point of distinction is that in *Old Chief*, the element at issue was the existence of any prior felony conviction; the government did not have to show the nature of the felony to establish the charged offense. *Id.* at 174- 75, 117 S.Ct. at 647. To convict Petersen and Root of aggravated DUI, however, the State needed to establish they committed DUI while driving on a suspended license or sustained two prior DUI convictions within sixty months. The State thus could not establish these elements of the charged offense without showing the nature of the prior offenses. *Old Chief* does not further defendants' argument.

¶ 16 We conclude that because the prior convictions to which the defendants agreed to stipulate constitute elements of the charged offense, they were not entitled to a bifurcated trial.

III.

¶ 17 For the foregoing reasons, we approve the court of appeals' opinion reversing the trial court's judgment in *Petersen*; we vacate the court of appeals' opinion in *Root* and reinstate Root's conviction.

Ruth V. McGregor, Justice

CONCURRING:
Thomas A. Zlaket, Chief Justice
Charles E. Jones, Vice Chief Justice
Frederick J. Martone, Justice

FELDMAN, Justice, specially concurring

¶ 18 I disagree with the analysis applied and therefore write separately.

¶ 19 The basis for my disagreement with the majority's analysis is well set forth in the court of appeals' opinion in *State v. Root*, 193 Ariz. 442, 973 P.2d 1203 (App.1998), and need not be repeated here. The Wisconsin Supreme Court reached a conclusion similar to that in *Root* in *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997). The Wisconsin court held that when the defendant offers to stipulate to a prior status offense and the state rejects the offer for no purpose other than to present propensity evidence, hoping to stir up whatever prejudice may result when the jury learns of the defendant's prior convictions, the trial judge has discretion to withhold the evidence under evidence rules similar to ours. *See* Rules 403 and 404, Ariz.R.Evid.

¶ 20 In my view, these rules are not trumped by Rule 19.1, Ariz.R.Crim.P., which was promulgated just to avoid prejudice in situations similar to that in the present case. Rule 19.1 was intended to cover cases in which, to avoid unnecessary prejudice, the defendant offered to stipulate to the fact of conviction. Its text does not deal with the present situation but, rather, with trial of contested issues regarding prior convictions. I therefore believe Rule 19.1 co-exists with Rule 403 and, as recognized by *Root*, the trial judge may accept the stipulation and withhold evidence of the prior convictions from the jury. If Rule 19.1 prevents this, it should be changed.

¶ 21 By enacting the current statute, the legislature changed prior convictions in DUI cases from sentence enhancers to elements of the crime. This, of course, does not overcome the provisions of Rule 403 permitting judges to exclude relevant evidence when probative value is outweighed by prejudice. The legislature cannot, by the simple

expedient of changing labels, interfere with the court's rule-making power. *State ex rel. Napolitano v. Brown*, --- Ariz. ----, 982 P.2d 815 (1999). The provisions of article VI, § 5(5) of the Arizona Constitution, which give the court the power to make procedural rules, including the Rules of Evidence, is designed to ensure that courts will operate in a manner that will ensure a fair trial for everyone. *Root*, 193 Ariz. at 445, 973 P.2d at 1206-07. In the situations presented by the cases before us, this can only be accomplished by recognizing the trial judge's discretion to handle the case under Rule 403. *Id.*

¶ 22 But the issue the court chooses to address in these cases is whether Defendants were entitled to a bifurcated trial under Rule 19.1. Believing that rule inapplicable to these cases, I join in the narrow holding that Defendants were not entitled to a bifurcated trial.

Stanley G. Feldman, Justice

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
–	)	1 CA-CR 97-0737
Appellee,	)	
	)	Department E
v.	)	
	)	O P I N I O N
LANCE ALLEN ROOT,	)	
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 96-92542

The Honorable Cheryl K. Hendrix, Judge

REVERSED AND REMANDED

GRANT WOODS, The Attorney General
By: Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and: Serena Christion
Assistant Attorney General
Attorneys for Appellee — Phoenix

LAW OFFICES OF DAVID MICHAEL CANTOR, P.C.
By: David Michael Cantor
Attorney for Appellant Mesa

GARBARINO, Judge

¶ 1 Lance Allen Root (the defendant) appeals his conviction and sentence for aggravated driving under the influence of intoxicating liquor or drugs (aggravated DUI), a class 4 felony. We reverse and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

¶ 2 In the early morning hours of April 21, 1996, a Mesa police officer responded to a report of a two-car accident. While the officer was speaking with T.B., the driver of one of the vehicles, the defendant, the driver of the other vehicle, approached T.B. and apologized to her for the accident. Upon questioning the defendant about the accident, the officer detected the odor of alcohol on the defendant's breath and observed that his speech was slightly slurred and his eyes were watery and bloodshot. The officer asked the defendant if he had been drinking. The defendant responded that he had just left a party where he had consumed two beers. He agreed to provide a breath sample on an Alco-Sensor, a portable breath testing device. The sample tested positive for the presence of alcohol. The officer then conducted various field sobriety tests before concluding that probable cause existed to arrest the defendant for driving while intoxicated.

¶ 3 The officer explained Arizona's implied consent law to the defendant, see Arizona Revised Statutes Annotated (A.R.S.) section

28-691,[1] and requested that he consent to a blood test. When the defendant refused to consent, the officer informed him that he intended to obtain a search warrant authorizing him to draw the defendant's blood. The officer then transported the defendant to the Mesa jail. At jail, the defendant agreed to provide a blood sample. The resulting blood test, performed approximately two and one-half hours after the accident, revealed a blood alcohol content (BAC) of .08.

¶4 The defendant had previously been convicted of DUI in 1991 and 1994. The State charged the defendant by information with two counts of aggravated DUI, alleging violations of both A.R.S. section 28-697(A)(1)[2] (DUI with license suspended, canceled, revoked or refused) and A.R.S. section 28-697(A)(2) (third or subsequent DUI in a sixty month period). The State proceeded to trial on the second count only, driving while impaired to the slightest degree with two prior DUI convictions. The jury returned a guilty verdict. The court subsequently revoked the defendant's license, suspended imposition of sentence, and placed him on six years' probation. The court also ordered the defendant to serve a jail term of four months with no days of presentence incarceration credit.

¶ 5 The defendant timely appealed his conviction and sentence. He first argues that the trial court abused its discretion by admitting evidence of his two prior DUI convictions. He also contends that the

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[1]This section has since been renumbered as A.R.S. section 28-1321 by ch. 76, § 3, 1996 Ariz. Sess. Laws 198 and amended by ch. 1, § 102, 1997 Ariz. Sess. Laws 83-86.

[2]This section has since been renumbered as A.R.S. section 28-1383 and amended by ch. 76, §§ 3, 25, 1996 Ariz. Sess. Laws 199, 298-99.

trial court erred by instructing the jury on certain statutory presumptions. We have jurisdiction pursuant to article VI, section 9 of the Arizona Constitution and A.R.S. sections 12-120.21 (1992), 13-4031 (1989), and 13-4033(A) (Supp.1997).

ISSUES

1. Did the trial court err by denying the motion to preclude all evidence of the defendant's prior DUI convictions once the defendant had agreed to stipulate to their existence in order to satisfy an element of the charged offense?
2. Did the trial court err by instructing the jury on the statutory presumptions of A.R.S. section 28-692(E)[3]?

DISCUSSION

¶ 6 We view the facts in the light most favorable to sustaining the verdicts, resolving all reasonable inferences against the defendant. See *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992).

I. Evidence of Prior DUI Convictions

¶ 7 Prior to trial, the defendant offered to stipulate that he had been convicted of two prior DUI offenses in the preceding sixty months if, in exchange for his admission, the trial court precluded the State from mentioning those prior convictions during trial. Because the information included references to his two prior convictions, the defendant also filed a motion in limine seeking to preclude the trial court from reading the charging document to the jury.

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[3]This section has since been renumbered as A.R.S. section 28- 1381(H) by ch. 76, § 3, 1996 Ariz. Sess. Laws 199.

¶ 8 The defendant argued that evidence of his two prior DUI offenses would be unfairly prejudicial because it would amount to nothing more than improper character evidence, and would invite the jury to conclude that he was more likely to have been driving under the influence on this occasion. The trial court denied the motion, noting that the prior DUI convictions were an element of the offense charged and that the jury needed to be informed of their existence.

¶ 9 The defendant now challenges the trial court's ruling. He argues, as he did in his motion in limine, that the United States Supreme Court's ruling in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), required the trial court to order the State to accept such a stipulation and to preclude any reference to the prior DUI convictions. We agree.

¶10 Evidence of a prior conviction or convictions, often without much more, is the impetus for a jury to convict. It has long been the rule that evidence of unrelated criminal acts cannot be admitted to support commission of the crime being prosecuted. *See Crowell v. State*, 15 Ariz. 66, 69, 136 P. 279, 280 (1913).

> "The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."

Quen Guey v. State, 20 Ariz. 363, 368-69, 181 P. 175, 177 (1919) (quoting *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319 (N.Y.1887)).

¶11 We acknowledge that an exception to the rule exists in that evidence of other criminal acts will be admitted if it directly establishes an essential element of a crime. *See State ex rel. Romley v. Begody*, 171 Ariz. 468, 470-71, 831 P.2d 844, 846-47 (App.1992).

Here, however, the defendant offered to stipulate to the two prior DUI convictions that constitute an essential element of the offense of aggravated DUI. The defendant's stipulation would have satisfied an element of the offense of aggravated DUI, and it would have avoided the risk that the jury would find the defendant guilty because he committed the same crime on two prior occasions. *See* Ariz. R. Evid. 403 (necessitating a balance of competing factors to determine whether the prejudice caused by admission of the evidence would outweigh its probative relevance).

¶12 In *Old Chief*, the government charged a defendant with, among other offenses, a violation of 18 U.S.C. § 922(g)(1), which prohibits a convicted felon from possessing a firearm. *See* 519 U.S. at 175, 117 S.Ct. 644. The defendant had previously been convicted of assault resulting in serious bodily injury. Before his trial, he moved for an order prohibiting the government from mentioning the nature of his prior felony conviction. *See id.* at 175-76, 117 S.Ct. 644. In return, he offered to stipulate that he had previously been convicted of a felony. *See id.* at 176, 117 S.Ct. 644. He argued that informing the jury of the precise nature of his prior felony conviction would unfairly prejudice the jury against him, and that this evidence was therefore inadmissible under Rule 403 of the Federal Rules of Evidence. *See id.* The trial court denied Old Chief's motion and, over objection, the government introduced the order of judgment and commitment for his prior conviction. *See id.*

¶13 The Supreme Court reversed, holding that under Rule 403, the probative value of the precise nature of Old Chief's prior conviction was substantially outweighed by the danger that its admission would be unfairly prejudicial to him. *See* 519 U.S. at 183, 117 S.Ct. 644. The Supreme Court reasoned that, to convict Old Chief under 18 U.S.C. § 922(g)(1), the jury only needed to know that he was a convicted felon and that he had been in possession of a firearm. Because Old Chief was willing to stipulate to the jury that he was a

convicted felon, the government had no legitimate purpose in presenting the prejudicial information about the prior conviction. *See* 519 U.S. at 180, 117 S.Ct. 644.

¶14 The Wisconsin Supreme Court, in *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997), a DUI case decided after *Old Chief*, went beyond the holding in *Old Chief*, to prohibit any mention of prior convictions to the jury. The court deduced that jurors, relying on their experiences and common sense, would conclude that if a defendant charged with driving with a prohibited alcohol concentration has prior convictions, the convictions are for driving offenses and likely drunk driving offenses. *See Alexander*, 571 N.W.2d at 670. The court held that when the sole purpose of introducing a defendant's prior convictions is to prove a status element and the defendant admits that element, the danger of prejudice far outweighs the probative value, which the court concluded is "virtually nil." *Id.* at 671.

¶15 In his dissent, our colleague expresses concern about this Court's crossing the line into the legislative arena and deciding "the wisdom or even the fairness of any legislative enactment." We certainly recognize and respect the line of demarcation that separates the functions of the judiciary from those of the legislature. By this decision, we are neither rewriting the statute nor deleting the requirement that a defendant must have two prior convictions to be found guilty of felony DUI. In keeping with the Arizona Rules of Evidence, we are merely trying "to secure fairness" so that "the truth may be ascertained and [the] proceedings justly determined." Ariz. R. Evid. 102.

¶16 The challenge in the present case is to do justice to the

legislative intent behind A.R.S. section 28-697(A)(2)[4] and, at the same time, make certain that an accused retains the right to be presumed innocent until proven guilty. *See State v. Leonard*, 151 Ariz. 1, 7-8, 725 P.2d 493, 499-500 (App.1986) (finding error in the trial court's rejection of a defendant's proffered stipulation, even though the stipulation was to be made "outside the presence of the jury"). *But see State v. Rebollosa*, 177 Ariz. 399, 401, 868 P.2d 982, 984 (App.1993) (disagreeing with Leonard to the extent that it stands for the proposition that any stipulation involving an element of the offense agreed to by the parties may not be presented to the jury).

¶17 We also note that the present case is distinguishable from both *State v. Geschwind*, 136 Ariz. 360, 666 P.2d 460 (1983), and *State v. Virgo*, 190 Ariz. 349, 947 P.2d 923 (App.1997). Neither *Geschwind* nor *Virgo* concerns an admission of guilt. In *Geschwind*, the court held that the defendant was not entitled to a bifurcated trial concerning his prior DUI conviction because the prior conviction constituted an element of felonious DUI, the offense charged. *See* 136 Ariz. at 362-63, 666 P.2d at 462-63. In contrast to the defendant's proffered admission in this case, the *Geschwind* court only considered the order of proof in the trial court and the feasibility of a bifurcated trial. In *Virgo*, the parties agreed "to stipulate that the substance seized ... was a usable quantity of marijuana with a weight of 35 pounds." 190 Ariz. at 350, 947 P.2d at 924. The stipulation only established that there was thirty-five pounds of marijuana; the defendant did not admit that he possessed thirty-five pounds of marijuana.

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[4]To convict a defendant of aggravated DUI under this section, a jury must find that he has been convicted of DUI on at least two occasions in the preceding sixty months. See A.R.S. § 28-697(A)(2).

¶18 Although a carte blanche rule allowing the State to introduce evidence of prior DUI convictions when they are elements of the crime charged would make a trial less complicated, it almost ensures an automatic conviction. That, we believe, was not the intent of the legislature. Accordingly, we reverse the trial court's denial of the defendant's motion to preclude evidence of his prior DUI convictions, made in conjunction with his offer to stipulate to admit to the prior convictions.

II. Instruction on Statutory Presumptions

¶19 The second issue is whether the trial court erred when it instructed the jury on the statutory presumptions related to the results of the BAC test performed on the defendant approximately two and one-half hours after the accident. The test revealed a BAC of .08. At trial, the State's criminalist retroactively extrapolated the defendant's .08 BAC to within two hours of driving; she testified that depending on certain variables, such as the time the defendant last consumed alcohol, a BAC of .08 measured two and one-half hours after the accident would have placed the defendant's BAC anywhere between .065 and .16 at the time of the accident.

¶20 Over objection, the trial court instructed the jurors on the presumptions that they could draw from this evidence pursuant to A.R.S. section 28-692(E):

> The amount of alcohol in a defendant's blood gives rise [to] the following presumptions: If there was within two hours of the time of driving .05 percent or less by concentration of alcohol in the defendant's blood, it may be presumed that the defendant was not under the influence of intoxicating liquor.
>
> ....
>
> If there was within two hours of the time of driving, more than .05, but less than .10 percent by concentration of alcohol in the defendant's blood, such fact does not give rise to any presumption

that the defendant was or was not under the influence of intoxicating liquor.

If there was within two hours of the time of driving .10 percent or more by concentration of alcohol in the defendant's blood, it may be presumed that the defendant was under the influence of intoxicating liquor.

¶21 The defendant argues that because the statutory presumptions of section 28-692(E) did not apply in this case, the offered instruction constituted reversible error. According to the defendant, the presumptions only apply when evidence exists of "the defendant's alcohol concentration *within two hours of the time of driving ... as shown by analysis of the defendant's blood, breath or other bodily substance.*" A.R.S. § 28- 692(E) (emphasis added). In other words, the defendant interprets the statute as requiring the State to perform a test of a DUI suspect's blood, breath, or other bodily substance within two hours of the time of driving or physical control of a vehicle. Because the analysis of the defendant's blood did not occur until two and one-half hours after the accident, the defendant maintains that the State had no evidence of his BAC within the required two-hour time frame and that the instruction regarding the statutory presumptions was therefore inappropriate and misleading. We disagree.

¶22 When a defendant's BAC is not measured within two hours of driving, the State may still meet its burden of proving that the defendant had a BAC of 0.10 or more within the two-hour period by using retroactive extrapolation or "evidence relating the defendant's blood alcohol content back." *State v. Kankelfritz*, 187 Ariz. 440, 441,

930 P.2d 517, 518 (App.1996).[5] Although A.R.S. section 28-692(A)(2) refers to a defendant's alcohol concentration "within two hours of driving or being in actual physical control of the vehicle," the statute does not require that the alcohol concentration be measured during that two-hour period. *Id.* at 441, 930 P.2d at 518. Rather, retroactive extrapolation evidence relating a defendant's BAC back to two hours within the time of driving would be sufficient to justify an instruction on the statutory presumptions of A.R.S. section 28-692(E), even if the actual measurement of the BAC did not occur within those two hours.

¶23 In this case, the prosecution presented the necessary retroactive extrapolation through the State criminalist's expert testimony. The evidence indicated that the defendant had a BAC of .08 two and one-half hours after the accident. Relying on this evidence, the State's criminalist testified that the defendant's BAC would have been between .065 and .16 at the time of the accident. Clearly, the accident happened "within two hours of the time of driving or being in actual physical control" of the vehicle. Thus, the jury was presented with evidence concerning the defendant's BAC during the relevant two-hour time frame. The trial court did not err in giving the presumption instruction to assist the jurors in deciding whether the defendant was impaired to the slightest degree when the accident occurred.

CONCLUSION

¶24 We reverse the trial court's denial of the defendant's offer to stipulate and motion in limine, and we remand this matter to the trial court for a new trial.

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[5]We disagree with *State v. Kankelfritz* to the extent that it states that evidence must relate "back to the time of driving," rather than to within two hours of driving.

WILLIAM F. GARBARINO,
Presiding Judge

CONCURRING:
RUDOLPH J. GERBER, Judge

TOCI, Judge, dissenting.

¶25 I respectfully dissent. My disagreement with my colleagues is legal as well as philosophical. Here, the legislature has defined the elements of the offenses for which defendant is charged. Under the more serious charge, the elements are driving under the influence with two previous DUI convictions within sixty months preceding the arrest. The essence of the majority opinion is that the legislature has unfairly prejudiced defendant by providing that defendant's prior misdemeanor convictions are an element of the crime of aggravated DUI. Consequently, according to the majority, these prior convictions must be withheld from the jury.

¶26 It seems to me that in reaching this conclusion the majority has strayed from what are commonly accepted as two fundamental precepts of appellate judging--one rooted in the separation of powers and the other in the doctrine of stare decisis. As to the first, we are constrained as appellate judges to acknowledge the line of demarcation that separates our function from that of the legislature. This proposition has a corollary--the rule, often cited, that absent a constitutional question, our role is to apply the statutes as written by our elected officials. It is not our function to determine the wisdom or even the fairness of any legislative enactment. It seems to me that the majority has crossed the line and made that legislative determination. The opinion rewrites the statute to accord with what the majority thinks is fair to defendant. In concluding that the statute is unfairly prejudicial to defendant, the majority has failed to give the legislature its due.

¶27 As to the second precept, our judicial tradition acknowledges the role of precedent in our system of justice. As a general principle, good reasons exist for this policy. Most important is the consistency and predictability that stare decisis provides to the law. In our case--we are after all an intermediate court of appeals--we are constrained to follow decisions of our supreme court. Applying that principle here, this outcome should have been controlled by the opinion of our supreme court in *Geschwind*, 136 Ariz. 360, 666 P.2d 460. There, the court clearly stated that evidence of the underlying crime or conduct included by the legislature as an element of the crime "cannot be precluded as irrelevant or unfairly prejudicial." *Id.* at 363, 666 P.2d at 463. Nevertheless, directly contrary to *Geschwind*, the majority holds that an element of the crime cannot be proven because the only purpose of doing so would be to prejudice defendant.

¶28 Except for this case, we have consistently followed the principles in *Geschwind* since the legislature enacted the present aggravated DUI statute. Most recently, in *State v. Galati (Petersen)*, --- Ariz. ----, 973 P.2d 1198 (Ct.App.1998), a panel of this court rejected the reasoning applied by the majority here and instead followed *Geschwind*. In *Galati*, on facts similar to these, we concluded that the trial court erred in keeping prior DUI convictions from the jury. We noted that under Rule 19.1(b), Arizona Rules of Criminal Procedure, if the prior conviction alleged is an element of the crime, a defendant is not entitled to a bifurcated trial. *Id.* at ¶ 8.

¶29 Our decision in *Galati* was foreshadowed by other decisions of this court in which we have consistently held that a stipulation as to an element of a crime must be presented to the jury. *See State v. Brito*, 183 Ariz. 535, 537-38, 905 P.2d 544, 546-47 (App.1995); *State v. Superior Court (Walker)*, 176 Ariz. 614, 616, 863 P.2d 906, 908 (App.1993); *Rebollosa*, 177 Ariz. at 402, 868 P.2d at 985; *see also Virgo*, 190 Ariz. at 353, 947 P.2d at 927. The rationale of these cases is persuasive. The legislature has wide latitude in defining crimes.

See Brito, 183 Ariz. at 537, 905 P.2d at 546. When the legislature prescribes the elements of a crime, the state must prove every element beyond a reasonable doubt. *See Rebollosa*, 177 Ariz. at 402, 868 P.2d at 985. Even if the state and the defendant stipulate to an element of the crime, the stipulation is not binding on the jury. *See Virgo*, 190 Ariz. at 353, 947 P.2d at 927. If the jury verdict does not include an element of the offense, any stipulated facts related to the element may not be considered proven. *See id.*

¶30 *Old Chief*, relied on by the majority, does not require us to overturn *Geschwind* and the cases decided by this court. In *Old Chief*, the defendant was charged with violating a federal statute that prohibits a convicted felon from possessing a firearm. 519 U.S. at 174, 117 S.Ct. 644. The defendant had previously been convicted of assault resulting in serious bodily injury. *See id.* at 175, 117 S.Ct. 644. The defendant moved to prohibit the government from mentioning the exact nature of his previous conviction. He offered to stipulate that he had previously been convicted of a felony. He argued that informing the jury of the precise nature of his prior felony conviction would unfairly prejudice him, and the evidence was therefore inadmissible under Rule 403 of the Federal Rules of Evidence. *See id.*

¶31 The trial court denied his motion and the government introduced the order of judgment and his prior conviction. *See id.* at 177, 117 S.Ct. 644. On appeal, the Supreme Court reversed. *See id.* at 178, 117 S.Ct. 644. The Court reasoned that, to convict the defendant under the statute, the jury needed to know only that he was a convicted felon and that he had been in possession of a firearm. *See id.* at 190-91, 117 S.Ct. 644. Because he was willing to stipulate concerning his status as a convicted felon, the government had no legitimate purpose in going into the details of his conviction. See id.

¶32 *Old Chief* simply does not apply here. In this case, to convict

defendant of aggravated DUI the jury was required to find, among other things, that he had been convicted of DUI on at least two occasions in the preceding sixty months. Arizona Revised Statutes Annotated section 28-697(A) requires specific proof of prior DUI convictions. The existence of prior DUI convictions is an element of the offense with which defendant was charged. In *Old Chief*, the federal statute required proof only of a felony conviction.

¶33 Furthermore, in *Old Chief*, the defendant was willing to stipulate to the fact that he was a convicted felon--an element of the offense with which he was charged. 519 U.S. at 175, 117 S.Ct. 644. Here, defendant was willing to stipulate only to the prior DUI convictions if this information was kept from the jury. *Old Chief* does not require a trial court to accept such a stipulation. Thus, even under the analysis in *Old Chief*, the trial court erred in precluding evidence of the prior DUI convictions.

¶34 But even if *Old Chief* were directly on point, we are not bound to accept that decision in the face of *Geschwind*. *Old Chief* is not a decision of the United States Supreme Court on a constitutional question. It is essentially a decision on the federal rules of evidence, and not one that we need follow. *See State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993). *Geschwind* is still controlling authority in Arizona on this point, and we are bound to follow it.

¶35 I would affirm.

PHILIP E. TOCI, Judge

IN THE SUPERIOR COURT IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	1 CA CR
	)	
Plaintiff,	)	Maricopa County
	)	Superior Court
v.	)	CR 96-92542
	)	
LANCE ALLEN ROOT,	)	
	)	
Defendant.	)	
	)	

Mesa, Arizona
May 20, 1997

BEFORE THE HONORABLE CHERYL K. HENDRIX
JUDGE PRESIDING

FOR THE STATE: JASON MAXWELL
Deputy County Attorney

FOR THE DEFENDANT: DAVID MICHAEL CANTOR
Privately-Retained Counsel

REPORTER'S TRANSCRIPT OF THE PROCEEDINGS
(Trial - Volume I)

Melissa Gonsalves
Official Court Reporter

PROCEEDINGS

. . .

. . .

THE COURT: Motion in Limine, Mr. Cantor?

MR. CANTOR: Yes, your honor.

Have you had a chance to read through the Motion?

THE COURT: Of course I have.

MR. CANTOR: Oh, the -- I argued last week in front of Judge Araneta and he hadn't had a chance to look at it yet. That's why I always ask, just in case.

Your Honor, as you've seen from our motion, the case *U.S. v. Old Chief*, the problem I think a lot of defense attorneys have always had and prosecutors have always enjoyed, myself being a prosecutor at one time --

THE COURT: Mr. Root, if you are comfortable standing, you can stand, but you can also be seated.

THE DEFENDANT: Sure. Sorry.

MR. CANTOR: Your Honor, the fact that -- I know it's an element of the offense that there are two prior convictions, but the prejudice, unfair prejudice, far outweighs the probative value to tell this to a jury, and even as a prosecutor, we've even heard, "Once I hear he's done it twice before, that's it." The mind shuts off and they'll go with the conviction.

Basically what we're asking is we'll offer up a stipulation that the Court holds and we simply present to the jury the issue of was he impaired while driving or was he not. And then we don't get into the issue of, well, he's been convicted twice within the last five years.

We just feel that the unfair prejudice exists, and I think it's fairly obvious to almost anybody if you tell somebody, well, he's been accused of this and this and this, and by the way, he's been convicted twice before in the last five years, you're going to presume, well, gee, that definitely lends itself towards the fact that he probably did it this time.

Now, in *U.S. v. Old Chief*, I know that's a federal case. I

know that in the *Old Chief* case, he was charged with felony possession of a firearm, and the reason he was a felon had to do with using a firearm in a previous offense. In that case, the stipulation was offered, well, we'll offer up that he was a felon, but let's not tell the jury why he was a felon and offer up the paperwork showing why he was convicted as a felon, and the stipulation was turned down. The Supreme Court said it should have been accepted, that it was an abuse of discretion not to accept it.

In this case, what we're offering up is maybe telling the jury he has been convicted of two prior traffic offenses in the last five years without stating that they are for DUI, or something of that nature, only because of the unfair prejudice.

I know in *State v. Brito* case, that had to do with a State challenge, I believe on the suspended license issue and bifurcation issues. When *Old Chief* came down in January, we felt that the argument was directly on point with why this statute is so prejudicial. Not that it shouldn't be there, not that having two priors justifies

making this a felony charge, only that when you tell a jury he was convicted on "X" date for violation "X" date and again for a violation on "X" date and convicted on "X" date, the jury tends to shut off their mind.

In this case, this is the perfect scenario. This is a case that involves a .08 blood alcohol. And the risk we run is normally an .08 blood alcohol is a very good case, but telling the jury the extra bonus of, by the way, he's been convicted twice before, tends to have the jury shut down.

I believe we've outlined all of the case law, and I understand Mr. Maxwell's response. He is attempting to use the *State v. Bible* case, which had to do with Frye issues and *Daubert v. Merrell Dow Pharmaceuticals* that had to do with the Frye issue, and in federal civil cases there is no longer Frye issues. Yet in *Bible* they said we are going to honor *Frye* in the State of Arizona on criminal issues. He has taken that case for the proposition that, well, *Old Chief* was a federal case that dealt with federal rules. It doesn't apply here so

ignore it.

What we're stating is it should apply here. The logic listed regarding unfair prejudice, and given the fact that the federal rules and the State rules are identical, verbatim, it should apply here. And once and for all, the State of Arizona should allow defendants to stipulate to the prior convictions and that should be held by the judge, and all the jury should consider is whether this man was driving impaired or not. Obviously, if they should say, yes, he was, you've got the stipulation regarding his priors. All of the elements are satisfied, and then it's a felony.

But again, I think from any person's point of view, even a lay person would agree, wow, a DUI charge, an .080, isn't the legal limit .10, it's under the limit. Oh, he's done it twice before? Oh, well, he's been convicted twice before for DUI, what's he doing? This is the third time. And they might convict him on improper grounds thinking -- we even quoted the language that although he may not be guilty now, he's probably gone and done it there, and he should be convicted

for the public good. That's what we're trying to avoid here.

I know I'm dumping this on you as the first one to actually -- in my case last week a directed verdict was entered. So I know technically you are the first one to really hear this one with a full record, and I know I'm kind of dumping this on you, and I know it's a test motion, but again, we feel that it's a legitimate motion, and I think if you read the logic you will tend to agree.

Thank you, your Honor.

THE COURT: Mr. Cantor, I appreciate from whence you have come, because at one time our Supreme Court told us that, yes, we need a bifurcated trial to determine whether or not a defendant has two prior felony convictions, and then they changed their mind. And there's nothing to say that they won't change their mind again. It has to do with, in essence, prior bad acts and how prejudicial they are.

Obviously, if in *Old Chief* the prior crime had been possessing a lobster that was less than six inches, the defendant would have wanted that made known to the jury, and I agree with you, and that's

why we have the Rule that precludes similar bad acts from being introduced unless there's more probative value than prejudicial value, but the law as it currently stands in Arizona is that they are elements of the offense and must be proven by the State and the trial need not be bifurcated. I will go with the law as it currently exists and allow you to be the one that goes and gets it changed.

MR. CANTOR: Thank you, your Honor.

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. . .

SUPREME COURT

Noel K. Dessaint
Clerk of Court

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1501 West Washington Street
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Telephone: (602) 542-9396

Kathleen E. Kempley
Chief Deputy Clerk

September 28, 1999

AMENDED

RE: STATE OF ARIZONA vs. rel RICHARD M. ROMLEY vs. HON. FRANK T. GALATI-MAR CO SUP CT/RUSSELL K. PETERSON
Supreme Court No. CV-98-0558-PR
Court of Appeals No. 1 CA-SA 98-0143
Maricopa County No. CR97-08186

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 21, 1999, in regard to the above-referenced cause:

ORDERED: Motion to Reconsider = DENIED.

NOEL K. DESSAINT, Clerk

TO:
Richard M. Romley, Esq., Maricopa County Attorney
Attn: Gerald R. Grant, Esq.
Dean W. Trebesch, Esq., Maricopa County Public Defender
Attn: Daniel Carrion, Esq., John Rock, Esq., and Tammy Wray, Esq.

Michael J. Dew Esq.
H. Allen Gerhardt, Jr., Esq., Coconino County Public Defender
Attn: Diane S. McCoy, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
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cj

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law. . . .

Rule 403, Federal Rules of Evidence, provides:

> **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b), Federal Rules of Evidence, provides, in pertinent part:

> **Rule 404. Character Evidence Not Admissible to prove conduct; exceptions; Other Crimes**
>
> . . .
>
> . . .
>
> **(b) Other crimes, wrongs, or acts.** Evidence of ~~other~~ crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Rule 19.1.b, Arizona Rules of Criminal Procedure, provides:

Rule 19.1. Conduct of Trial

. . .

. . .

b. Proceedings when defendant is charged with prior convictions. In all prosecutions in which a prior conviction is alleged, unless such conviction is an element of the crime charged, the procedure shall be as follows:

(1) The trial shall proceed initially as though the offense charged were a first offense. When the indictment, information or complaint is read all reference to prior offenses shall be omitted. During the trial of the case no instructions shall be given, reference made, nor evidence received concerning prior offenses, excepted as permitted by the Rules of Evidence.

(2) If the verdict is guilty, the issue of the prior conviction shall then be tried, unless the defendant has admitted the prior conviction.

Arizona Revised Statutes §28-697.A.2[1] provides:

§ 28-697. Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs; violation; classification; penalties; notice; definition

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does either of the following:

. . .

2. Commits a third or subsequent violation of § 28-692[2] [DUI] or this section or is convicted of a violation of § 28-692 or this section and has previously been convicted of any combination of convictions of § 28-692 or this section or acts in another state, a court of the United States or a tribal court which if committed in this state would be a violation of § 28-692 or this section within a period of sixty months.

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[1]This section has since been renumbered as A.R.S. section 28-1383.A.2 and amended by ch. 76, §§ 3, 25, 1996 Ariz. Sess. Laws 199, 298-99.

[2]This section has since been renumbered as A.R.S. section 28-1381.